

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION-RIVERSIDE

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HONORABLE JESUS G. BERNAL, DISTRICT JUDGE PRESIDING

- - -

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) No. EDCR 23-21-JGB
)
JASON EDWARD THOMAS CARDIFF,)
)
Defendant.)
)

REPORTER'S TRANSCRIPT OF MOTION PROCEEDINGS

Riverside, California

Monday, June 3, 2024

2:32 p.m.

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Federal Official Court Reporter
United States District Court
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1 MONDAY, JUNE 3, 2024; RIVERSIDE, CALIFORNIA

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3 THE CLERK: Calling Item 4 on the calendar, Case No.
4 EDCR 23-21-JGB, United States of America v. Jason Edward Thomas
5 Cardiff.

02:32

6 Counsel, please make your appearances.

7 MS. MAKAREWICZ: Good afternoon, Your Honor.
8 Assistant United States Valerie Makarewicz on behalf of the
9 Government.

10 MR. SEBASTIAN: Good afternoon, Your Honor. Manu
11 Sebastian from the Consumer Protection Branch at DOJ.

02:32

12 THE COURT: Good afternoon.

13 MS. POTASHNER: Good afternoon, Your Honor. Hilary
14 Potashner on behalf of Mr. Cardiff.

15 MR. LARSON: Good afternoon, Your Honor. Stephen
16 Larson also on behalf of Mr. Cardiff. Your Honor, we also have
17 Stephen Cochell, who is Mr. Cardiff's civil attorney in the FTC
18 case; Jonathan Gershon from our office; and my daughter, Mary
19 Larson, who is interning with us this summer.

02:32

20 THE COURT: Good afternoon to you all.

02:33

21 The matter is on calendar on a motion made by the
22 defendant for dismissal of the Indictment on several grounds,
23 specifically the following grounds. So it's alleged in the
24 motion that Mr. Cardiff's due process and Fourth Amendment
25 rights were violated when the Government undertook a joint

02:33

1 civil and criminal investigation in bad faith and through
2 primarily the receiver that was appointed in the civil case
3 engaged in some conduct that would violate Mr. Cardiff's Fourth
4 Amendment and due process rights. So there's a second ground
5 for failing to preserve potentially exculpatory evidence. 02:34

6 Also, there's an allegation that there was fraud on the Court
7 committed in the civil action and that there was pre-Indictment
8 delay to the extent that it would prejudice the defendant in
9 the criminal action.

10 So let's focus first, if we can, on the second ground 02:34
11 that I mentioned, which is failing to preserve potentially
12 exculpatory evidence.

13 So Ms. Potashner?

14 MS. POTASHNER: Thank you, Your Honor.

15 THE COURT: So is it your position, then, that the 02:34
16 evidence we're talking about is potentially exculpatory, not
17 actually exculpatory? As you know, there's a difference in the
18 law as to how those two things are treated. So are you
19 alleging that the evidence is definitely exculpatory so that
20 bad faith is not an issue or are you saying that there were 02:35
21 potentially exculpatory evidence that was destroyed which would
22 require a finding of bad faith in order for the Indictment to
23 be dismissed?

24 MS. POTASHNER: Your Honor, I believe that the Court
25 has before it actually exculpatory evidence. I do think that 02:35

1 we could meet the standard of bad faith, but I don't think that
2 Your Honor needs to go to that standard because I believe that
3 it's actually exculpatory information. The reason I say that
4 is there is evidence before Your Honor which is in the form of
5 a declaration under oath from Mr. Cardiff explaining exactly
6 what evidence was destroyed that he does not have access to
7 anymore and exactly why that evidence would be exculpatory.

02:35

8 Conversely, the Government has proffered no evidence
9 to rebut that. There is no contrary declaration submitted by
10 the Government, no information undermining that assertion that
11 was made under oath. So I believe that it's actual exculpatory
12 evidence. I do note that the Government calls itself serving,
13 but that is not evidence. That's an adjective and that's, you
14 know -- that adjective has little meaning in this context.

02:35

15 Mr. Cardiff is in the best position to explain what
16 evidence was there and what evidence is no longer there and why
17 it would be exculpatory. Absent any contrary evidence
18 proffered by the Government, by declaration or otherwise,
19 there -- it's just -- it's not a fact in dispute.

02:36

20 THE COURT: Okay. So the evidence that we're talking
21 about is -- at least a subset of that is the documents that
22 were presumably destroyed at the receiver's direction, which
23 were involved in the Google Suite or the computer imaging of
24 the computers that were seized or copied from the premises of
25 Redwood, correct?

02:36

02:36

1 MS. POTASHNER: That's partially the list. That is
2 correct but not in total.

3 THE COURT: Right. So it's a subset of at least that
4 information, correct?

5 MS. POTASHNER: Yes, Your Honor. 02:37

6 THE COURT: And so -- and the Government provides
7 evidence that -- you know, substantially large amounts of
8 documents were produced as a result of that imaging of that
9 computer that was either seized or copied at the Redwood
10 premises. Why wouldn't you be able to point me to a specific 02:37
11 document that was produced by the Government that would be the
12 sort of document that's exculpatory in nature that you feel
13 there would be more of that was destroyed?

14 MS. POTASHNER: Well, Your Honor, I understand the
15 Court's question, but if I could back up a little bit to talk 02:37
16 about the evidence we're talking about because then I think I
17 could answer that question more clearly.

18 The information that I think was electronically
19 stored at some point and then destroyed was literally video
20 images of customer phone calls, video and audio images of 02:38
21 customer phone calls and audio image -- audio recordings of
22 those same calls. So those -- those are now gone. There would
23 be no -- no calls that I could point to in the Government's
24 documentation that would substitute for those or demonstrate
25 why those -- those audio and video recordings would be 02:38

1 exculpatory. They just -- they don't exist.

2 THE COURT: So those recordings of customer calls are
3 not part of what the Government produced in the civil action or
4 in this action. Is that what you're saying?

5 MS. POTASHNER: Correct. They're not -- they're in 02:38
6 whole cloth not there or that we could not find them. The
7 Government did offer a range of 13.5 million pages in order for
8 us to search for them. We did our due diligence. We searched
9 and searched and searched. They are not there. Unless the
10 Government can point to a recording that somehow we've missed, 02:39
11 they don't exist, and so they are now gone.

12 The second set of documents which are not there are
13 documents that were physical notebooks, that were handwritten
14 notebooks, notebooks that contained the records and information
15 that were -- that was written down by employees and also by 02:39
16 Mr. Cardiff himself.

17 THE COURT: So are you talking about the staff
18 meeting handwritten logbooks or the customer sales log sheets
19 or the handwritten notes?

20 MS. POTASHNER: All three, Your Honor. 02:39

21 THE COURT: Okay.

22 MS. POTASHNER: And so those documents wouldn't have
23 been electronically maintained in any computer system, so,
24 therefore, a copy of them wouldn't have made their way to the
25 Government. They were in the possession of the receiver. The 02:39

1 receiver took possession of Redwood and in taking possession of
2 Redwood took possession of all the documents. There is
3 absolutely no evidence that we could point to that would be
4 like those -- those documents. And that's why we can't --

5 THE COURT: Do you have an idea what volume of
6 documents we're talking about in those three categories?

02:40

7 MS. POTASHNER: If I may, Your Honor, speak to
8 Mr. Cardiff?

9 THE COURT: You may.

10 (Counsel and Defendant Cardiff confer.)

02:40

11 MS. POTASHNER: Your Honor, there would be about 150
12 to 200 notebooks.

13 THE COURT: Okay. Were any of these actually
14 authored by Mr. Cardiff?

15 MS. POTASHNER: Yes, Your Honor.

02:41

16 THE COURT: Okay. So let's have the Government
17 respond to those arguments at this time. Mr. Sebastian?

18 MR. SEBASTIAN: Yes, Your Honor. So in terms of the
19 material that you just named, including the video recordings,
20 handwritten notebooks, our understanding is that when the FTC
21 and the receiver went in with the immediate access, there was
22 material that was scanned, including handwritten notebooks.
23 That material that the FTC collected was turned over to us, and
24 we, in turn, turned it over to the defense.

02:41

25 In terms of video recordings and of the phone calls,

02:41

1 our understanding -- so the defense included this letter from
2 Google showing that Google Suite's data was deleted and that
3 this letter is a confirmation of that deletion, but we believe
4 that's a misstatement because the statement states that the
5 Government destroyed the data, and then Google confirmed that 02:42
6 that data was destroyed. But, in fact, the letter reports that
7 Google did not have material associated with three domains. 33
8 other domains were located --

9 THE COURT: Go back a few words and tell me that
10 again. 02:42

11 MR. SEBASTIAN: Sure. So the subpoena returned from
12 Google confirms that 33 accounts were still in the Google
13 account back when the return came in, and then three domains
14 were not included. And only those three domains were missing.
15 So Google doesn't confirm that it was destroyed, just that the 02:42
16 material wasn't there.

17 Now, internal Redwood emails from March 2018 indicate
18 that certain domains, like Redwood Sci, were never even
19 included in the Google Suites account, and the defendant is
20 familiar with that. These are his own documents, and these are 02:42
21 his IT staff discussing that material when that material was
22 supposed to be turned over to the FTC. Not only that, the
23 defendant is saying under oath that he had recorded phone calls
24 of what his employees were saying to consumers, but he was
25 compelled by the district court to turn over all of that 02:43

1 material, and that material was not produced. So it was
2 responsive to the CID, and it was --

3 THE COURT: That was before the receiver was
4 appointed, I presume?

5 MR. SEBASTIAN: That's correct. And so if this
6 material existed, it should have been turned over back in 2018.

02:43

7 THE COURT: How does that affect the analysis here,
8 though? Is it relevant to whether or not the Government had
9 it?

10 MR. SEBASTIAN: Well, there's a question as to its
11 actual existence. So if it existed in 2017, it should have
12 been turned over in response to the CID. And it wasn't turned
13 over at that time as defense to the civil allegations.

02:43

14 THE COURT: So you're using that fact to argue that
15 those documents do not, in fact, exist because if they did,
16 they would have been turned over?

02:43

17 MR. SEBASTIAN: So the Government can't for sure say
18 whether or not something existed or not. What we can say is
19 whether or not it was turned over. And we don't see that
20 material within the items that were turned over. And the
21 evidence that's shown in terms of --

02:43

22 THE COURT: So when the receiver took over and went
23 through Redwood, they found a lot of documents that had not
24 been turned over, correct?

25 MR. SEBASTIAN: They did. They found material that

02:44

1 wasn't turned over. They found material --

2 THE COURT: That was part of the civil -- the
3 district court problem with Mr. Cardiff, the fact that he was
4 not complying with the request to turn over documents to the
5 FTC?

02:44

6 MR. SEBASTIAN: That's correct. That's part of our
7 charge conduct, Your Honor, because there's evidence that he
8 was destroying material that was related to the CID and the
9 order that was compelling him to produce this material.

10 THE COURT: So as to the category of documents which
11 you believe were in your production, I think we talked about
12 the logbooks; is that correct?

02:44

13 MR. SEBASTIAN: So everything that was turned over to
14 us by the FTC and the receiver has been produced to the
15 defendant.

02:44

16 THE COURT: Right. I understand that. But what
17 categories in the categories that we just talked about do you
18 believe are included in that production?

19 MR. SEBASTIAN: So in our response, we pointed out
20 that there were notes that were collected, notes that were
21 scanned, books that were scanned.

02:45

22 THE COURT: Right.

23 MR. SEBASTIAN: Those were turned over.

24 THE COURT: And did you review those notes for
25 potentially exculpatory value --

02:45

1 MR. SEBASTIAN: So --

2 THE COURT: -- with regard to this motion?

3 MR. SEBASTIAN: -- the Government did review some of
4 this material and has turned over all of that material.

5 THE COURT: I'm not saying whether you turned it over 02:45
6 or not. I take it for granted that you did turn it over. I'm
7 saying do any of that material in your view contain exculpatory
8 evidence?

9 MR. SEBASTIAN: So the material that I personally
10 viewed I do not believe had exculpatory evidence within it. 02:45

11 THE COURT: And those include the notes that we've
12 been talking about, the handwritten notes, correct?

13 MR. SEBASTIAN: That's correct.

14 THE COURT: So your argument is basically saying that
15 those documents may yet exist at Google and might be obtainable 02:45
16 by the defendant, at least some of them, except for three
17 categories?

18 MR. SEBASTIAN: Some material can. There's three
19 domains that Google say are not there. But I don't know
20 what -- this response came in 2021. 02:45

21 THE COURT: Right.

22 MR. SEBASTIAN: So I don't know if it's still there.

23 THE COURT: Right.

24 MR. SEBASTIAN: And the Government was under no
25 obligation to issue search warrants to seize all of that data. 02:46

1 THE COURT: Okay. Do you have any other responses
2 that you haven't told me about?

3 MR. SEBASTIAN: So in terms here with the exculpatory
4 evidence, the Government -- or the defendant has failed to meet
5 his burden. He fails to show the Government's knowledge that 02:46
6 any of this material was exculpatory, and he ignores the fact
7 that not only did the Government collect and preserve the
8 material that it received, but it turned all that over.

9 THE COURT: Well, let's stop there, though. He has a
10 declaration in which he says "these documents existed" and 02:46
11 "they were exculpatory" and "they were taken by the
12 Government." If that is true, any knowledge of such documents
13 would be imputed to the Government because the Government took
14 them.

15 MR. SEBASTIAN: And if the material was there, the 02:46
16 Government turned it over if the Government took it.

17 THE COURT: So you're saying everything the
18 Government took --

19 MR. SEBASTIAN: We turned over everything.

20 THE COURT: So there was nothing that the receiver 02:46
21 obtained post-receivership which was not turned over and was
22 destroyed?

23 MR. SEBASTIAN: There is a difference there.

24 THE COURT: Okay.

25 MR. SEBASTIAN: So the receiver is not the 02:47

1 Government. The receiver is --

2 THE COURT: I understand that.

3 MR. SEBASTIAN: -- a Court-appointed agent. We --
4 the Government, the DOJ postal, received information from the
5 receiver and turned that over. Now, I can clarify that point 02:47
6 in that the material turned over to the DOJ occurred in 2018
7 through 2020. Right? The order to destroy that data was
8 anything remaining within the receiver's custody. But our
9 understanding is everything that the FTC and the receiver
10 collected was turned over to us when we issued our request. 02:47

11 THE COURT: So that phrase, "anything remaining in
12 the receiver's custody," you take that to mean that those would
13 be materials that were already turned over to you?

14 MR. SEBASTIAN: So a second set of data, right? So
15 if there's two sets of data -- 02:47

16 THE COURT: Who received data?

17 MR. SEBASTIAN: -- the receiver collected one set and
18 the Court ordered the receiver to destroy its set. But DOJ was
19 not ordered to destroy that data. So whatever DOJ collected
20 was turned over. Now, I can't -- 02:48

21 THE COURT: What do you make of the argument that
22 since there was at least the possibility of a criminal
23 prosecution coming, that the Government should have intervened,
24 somehow objected to the destruction of the evidence by the
25 receiver? 02:48

1 MR. SEBASTIAN: So the defendant was on notice that a
2 criminal -- that information could be turned over to the
3 Government. It was on the defendant to either plead the Fifth
4 and not turn over that documentation at that time --

5 THE COURT: No, but I'm talking about when -- when 02:48
6 the receiver was apparently ordered to destroy the remaining
7 evidence, why didn't the Government say *okay, wait, hold on a*
8 *minute. There might be exculpatory evidence there or why don't*
9 *you just not order the receiver to destroy evidence and turn*
10 *everything to us?* 02:48

11 MR. SEBASTIAN: So I think there's difficulty in
12 saying that, Your Honor, because that's -- first, you're
13 saying -- let me actually ask you this question. So are you
14 asking why we didn't ask the receiver not to destroy or why we
15 didn't inform the Court? 02:49

16 THE COURT: Ask the Court to order the receiver not
17 to destroy it.

18 MR. SEBASTIAN: So we received copies of information,
19 and so our understanding is that material relevant to the
20 investigation was turned over and we were going to produce that 02:49
21 material in the criminal investigation. The civil was its own
22 investigation, and the material that we collected was separate.
23 So whatever occurred in that civil case, that was its own case,
24 whereas we had our criminal investigation, which was completely
25 separate, collected copies of material, retained those 02:49

1 copies --

2 THE COURT: By the time the receiver destroyed the
3 allegedly exculpatory evidence, there was an active criminal
4 investigation?

5 MR. SEBASTIAN: Yes.

02:49

6 THE COURT: Okay. So why didn't the Government again
7 ask the Court not to order the receiver to destroy potentially
8 exculpatory evidence? Was the criminal division aware that
9 there was such an order?

10 MR. SEBASTIAN: Could you give me one second, Your
11 Honor?

02:49

12 THE COURT: Yes.

13 (Government counsel confer.)

14 MR. SEBASTIAN: Your Honor, the Government's -- the
15 DOJ's criminal investigation was separate from the civil
16 investigation, and so our understanding is the criminal
17 investigation collected the material relevant to its charged
18 conduct, collected all of the material relevant to it. That
19 material was turned over. The material that the receiver was
20 ordered to be destroyed was material relevant to the civil
21 investigation. Completely separate, two different parties.
22 None of it was --

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02:50

23 THE COURT: There was a large overlap between the
24 civil investigation and the -- with the criminal investigation,
25 that it's still the alleged defrauding of potential customers,

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1 correct?

2 MR. SEBASTIAN: Well, it's two different things. So
3 the civil investigation was looking to the defendant's false
4 advertising and claims made to consumers. The criminal
5 investigation is analyzing a small portion of it. It's a 02:51
6 four-month -- the charged conduct is four months of credit card
7 fraud where consumers were being charged without their consent,
8 and the defendant was going through old orders and just putting
9 through credit card charges. And then the next part of the
10 criminal investigation is based on the document destruction and 02:51
11 witness tampering associated with the CID. They're two
12 separate and distinct investigations, and they were looking at
13 two different things.

14 THE COURT: Well, I mean, I think there's some
15 overlap in relevance between -- as to some documents may be 02:51
16 relevant to both investigations. It seems that that's
17 potentially the case.

18 But in any event, we still haven't -- so your answer
19 to the question of why didn't the Government ask the Court to
20 not direct the receiver to destroy documents was because there 02:52
21 were two separate investigations, and the civil investigation
22 did not feel that that was appropriate because it was
23 concluded, the civil investigation was concluded, and did -- to
24 the extent that it was a separate criminal investigation, did
25 the people conducting the criminal investigation, were they 02:52

1 aware that there was an order to destroy the documents by the
2 receiver?

3 MR. SEBASTIAN: So the criminal team was aware of the
4 order. That order was forwarded to it by the FTC.

5 THE COURT: Okay.

02:52

6 MR. SEBASTIAN: But that was a completely different
7 case, and the civil components acted separately from the
8 criminal components.

9 THE COURT: I understand. So let's go on to the next
10 issue, which is --

02:52

11 Do you want to respond to that?

12 MS. POTASHNER: Your Honor, may I just point out one
13 thing? Because I think it will get to the meat of the matter
14 in terms of --

15 THE COURT: Yes.

02:53

16 MS. POTASHNER: -- what Your Honor was asking. If
17 the Court were to look at Exhibit 87, that's actually an email.

18 THE COURT: An email between who?

19 MS. POTASHNER: This looks better on TV than in real
20 life. So if I could describe what it is for Your Honor. That
21 email is an email that is dated September 14th, 2022, from the
22 FTC to DOJ, and it's advising -- it is advising DOJ that the
23 receiver is requesting permission to destroy the evidence. And
24 it's specifically flagging in that email the destruction of
25 evidence subparagraph. And so the FTC is expressly saying to

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02:53

1 DOJ, "we just want to flag this for you that this is
2 happening." I would take issue with it being completely
3 separate, and I'm sure Your Honor is going to want to go into
4 that a little bit later. But just in terms of what the DOJ
5 knew, the DOJ knew of that request before it was ordered. It
6 wasn't a completely separate situation where the DOJ learned
7 about it after the fact. And so I just want to make sure that
8 the record is quite clear that the FTC gave DOJ advanced notice
9 of that request by the receiver before it was ever ordered by
10 the Court.

02:54

02:54

11 THE COURT: Understood. And what's your response to
12 the argument by the Government here, that whatever was
13 remaining with the receiver was just a duplicate of material
14 that was already produced, and, therefore, there was nothing
15 new -- well, whatever was destroyed was already produced in the
16 hands of the defendant?

02:54

17 MS. POTASHNER: Your Honor, I keep -- in my brain I
18 keep -- I keep hearing the phrase *you know, we're the*
19 *Government, just trust us*, and the Government is just saying
20 that *it's our understanding, it's our belief, it's our* -- but
21 there is no evidence to that fact, that the entire receiver's
22 file was copied and given to the Government. There's just no
23 evidence of that. There's no declaration in real time saying
24 it. There's just -- there's no information that the Government
25 has put before Your Honor in anticipation of this motion to

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02:55

1 actually prove that fact. And we --

2 THE COURT: So let's go to that point.

3 Mr. Sebastian, it would have been easy for you to
4 contact the receiver and get a declaration in saying well,
5 *whatever I destroyed had already been produced. It was just a* 02:55
6 *copy of the material that was already existing in the hands of*
7 *the Government.* I didn't see any such declaration in your
8 opposition.

9 MR. SEBASTIAN: Your Honor, I don't think the
10 Government had an obligation to go seek out as much evidence as 02:55
11 it could to find something exculpatory. Right?

12 THE COURT: Not even after -- well, I mean, I guess
13 you couldn't do it after the reply and the declaration by the
14 defendant that there was actually exculpatory evidence in the
15 description of that. 02:56

16 MR. SEBASTIAN: So the receivership currently is
17 defunct and so -- but there is possibility to speak with
18 someone at the receivership entity itself. But just to clarify
19 before, Your Honor, I didn't say that we never received notice
20 of the destruction. 02:56

21 THE COURT: I --

22 MR. SEBASTIAN: We were notified. We received the
23 email.

24 THE COURT: Yeah, I understand that.

25 MR. SEBASTIAN: We didn't feel that we had a duty to 02:56

1 go and try to preserve all of the evidence. In fact, there was
2 so much material sitting there, where would we even store that?
3 The Government doesn't have the obligation to go there and take
4 boxes of material and store it anywhere. The reason for the
5 destruction was because Mr. Cardiff didn't pick up the material
6 and the receivership was wasting money storing that.

02:56

7 THE COURT: He was not allowed to have it, so it had
8 to be destroyed.

9 MR. SEBASTIAN: So he wasn't allowed to have consumer
10 data, right? It's not all data. It's just consumer data that
11 he wasn't permitted to have. So he went and collected 37 boxes
12 of other material, right?

02:56

13 So -- and another couple of notes, when we're talking
14 about the Nest Cam footage, for example, there's 14,000
15 still-frame images of Nest Cam footage, but there was no video
16 within that material. There was one 25-minute video taken
17 December 2016 of a -- of one room where they were packaging
18 material, but there were no other videos. So the fact that
19 that one video from 2016 existed and that there were 14,000
20 screenshots of images that came from the cameras but no actual
21 video goes back to our point where the Nest Camera footage,
22 there was only a ten-day subscription that was paid for. So
23 that material wouldn't have been sitting on the Google account
24 in October of 2018 when these calls and the charge conduct
25 occurred January through May of 2018. And the defense is

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02:57

1 arguing that this material could have been downloaded and saved
2 to the Google account. But we believe that that's contrary to
3 the facts because if the 14,000 picture images are there, then
4 the video should have been there if they existed.

5 THE COURT: Okay. Understood. All right. Let's now 02:58
6 go to the second point, which is the overlap and presumably
7 joint criminal and civil investigations which the defendant
8 argues violated his Fourth Amendment and due process rights.

9 So as the parties are well aware, this required --
10 requires, in essence, a finding of bad faith. The fact that 02:58
11 there were concurrent civil and criminal investigations that's
12 done by itself highlight any bad faith or any impropriety on
13 behalf of the Government. Also, the Government makes the
14 argument that, in fact, there was -- the civil investigation
15 was not a pretext to obtain incriminating evidence. Since the 02:58
16 civil investigation was protracted, the Government actually
17 obtained summary judgment on 16 of the claims, so it cannot be
18 really a pretext. And they cite some case law that says that
19 when there is sort of a pursuit of the civil investigation and
20 civil action to judgment, it's very rare to find bad faith 02:59
21 since there was an independent reason to continue with that
22 action apart from obtaining any evidence which would
23 potentially be relevant to the criminal matter.

24 So how do you address that, Ms. Potashner?

25 MS. POTASHNER: Your Honor, I don't think that the 02:59

1 conclusion that there was a -- there was a finding in favor of
2 the Government in the civil case obviates this entire issue. I
3 think that when you look at *Kordel*, *Kordel* lists a number of
4 different ways and examples that the Court should look to to
5 determine whether there's bad faith. We agree that there can 03:00
6 be simultaneous investigations on the civil and criminal side;
7 however, this is not just merely a simultaneous investigation.
8 When you look at the *Kordel* case, it really distills down to --
9 and I have the different examples that it gives. One example
10 is conducting a covert criminal investigation under the guise 03:00
11 of a civil action. That's one of the examples that there would
12 be bad faith. Another is engaging in deceit or affirmative
13 misrepresentation regarding the true purpose of the
14 investigation. And here I believe we have that, even if we set
15 aside the first -- the first *Kordel* factor based on the fact 03:00
16 that there was ultimately a finding in favor of the Government
17 on the civil side. But we do have affirmative
18 misrepresentations here.

19 We also have that Mr. Cardiff was not represented at
20 the start of the civil case. That is another factor that 03:00
21 *Kordel* tells us to look at. And most importantly, I think, is
22 the catchall factor, which is whether or not the Government
23 engaged in conduct that qualifies as special circumstances that
24 might suggest the unconstitutionality or impropriety of the
25 criminal prosecution. I think that's exactly what we have here 03:01

1 because I think when the Court reviews *Kordel*, what the Court
2 will find is that *Kordel* is looking at whether or not the
3 Government has gained an unfair advantage by the jockeying of,
4 you know, the criminal and the civil investigation unbeknownst
5 to the defendant. And that's the question here. Did the 03:01
6 Government in this particular case obtain an unfair advantage?
7 The answer is yes, it did. The answer is, you know, first, the
8 Government says *well, you know, the CID case came first, the*
9 *criminal* -- and so that came first before the criminal
10 investigation, but when you scratch the surface, that's not 03:01
11 actually true. The CID case was not against Mr. Cardiff. It
12 was against Redwood. And so really the criminal investigation
13 started.

14 And what we know from the specific facts here is that
15 the USPIS agent went to Redwood, Mr. Cardiff's place of 03:02
16 business, and tried to obtain access to it. And that happened
17 in the summer of 2018. She tried multiple times. She then
18 started -- and I can go back, and I think it's probably worth
19 doing -- the coordination that occurred well before the civil
20 case was ever filed. And so we have USPIS and the FTC 03:02
21 conducting a joint investigation before there's ever even a
22 civil case.

23 The civil case is then filed in October of 2018, and
24 Mr. Cardiff has no counsel. The Government selects within days
25 of that filing a receiver that has worked closely with the 03:02

1 Government, FTC, and DOJ in promoting criminal investigations.
2 That's -- that's the person that was selected by the Government
3 and put forward to the Court and the Court accepted because the
4 Court really didn't have the full information of what was going
5 on behind the scenes. When the receiver was suggested to the 03:03
6 Court and approved by the Court, the Court wasn't told *oh,*
7 *there's also a criminal investigation happening here. Oh,*
8 *there's already been coordination between the USPIS agent and*
9 *the FTC.* None of that information was surfaced for the Court.
10 So the Court, of course, presumably took it at face value. 03:03
11 This is a receiver. It's an appropriate receiver who's going
12 to be doing appropriate work.

13 Then, the Government started immediately with this
14 receiver that was known to the Government and orchestrated a
15 warrantless search within days of the receiver being appointed. 03:03
16 This is outside the scope of what the receiver was appointed as
17 a Court-appointed receiver to do. This was something that was
18 behind the scenes secretly done by the Government.

19 THE COURT: Didn't the civil Court allow the receiver
20 to take sort of immediate access or have immediate access to 03:04
21 the business and its premises?

22 MS. POTASHNER: Of course, Your Honor. And the Court
23 went further to say --

24 THE COURT: So how was it outside what the receiver
25 was supposed to do? 03:04

1 MS. POTASHNER: Because the -- because, Your Honor,
2 the receiver was permitted to take actions in order to protect
3 the business and to -- and to make sure that the assets weren't
4 dissipated. That was the goal of the receiver and that's why
5 the receiver was appointed. The receiver was also granted
6 permission to work with -- to --

03:04

7 THE COURT: Accommodate or consider any reasonable
8 request by law enforcement agents.

9 MS. POTASHNER: And I think that the key word there
10 is "reasonable," Your Honor. Reasonable to what end?
11 Reasonable to the end of the stated purpose of the receiver.
12 That's not what happened here. What happened here -- although
13 the Government tries to recast it as USPIIS was there just to
14 keep the peace while the receiver took possession of the
15 business, common sense dictates that's not true. There was
16 local law enforcement there for keeping the peace. USPIIS was
17 there because they had already planned for USPIIS to have a
18 complete warrantless search. And those were conversations that
19 predated the filing of the civil case, conversations that
20 predated the request for the receiver, and conversations that
21 were effected and resulted in an extensive warrantless search
22 of the premise outside of the knowledge of the Court, outside
23 the knowledge of Mr. Cardiff, who was unrepresented at that
24 time. That's the second -- that's the second example of the
25 unfair advantage.

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1 This is not an ordinary, simultaneous, or parallel
2 prosecution on the civil side and criminal side. This is
3 highly orchestrated. And the Government's attempt to recast it
4 just cannot be accepted by this Court. When you look at the
5 number, and we stopped counting at 710, but 710 communications 03:06
6 between the civil and criminal side with the Government. 710.
7 If you put that in a two-year period, that would be literally a
8 daily communication. And all we had was the written
9 communication. We didn't have the telephone calls; we didn't
10 have the Zooms; we didn't have the Teams; we didn't have 03:06
11 anything that wasn't provided to us in discovery.

12 So it's fair to say that that is probably a limited
13 subset of the amount of coordination happening. And we see the
14 coordination right at the beginning. That's an unfair
15 advantage. The Government was using the civil case in order to 03:06
16 circumvent the Fourth Amendment and in order to disregard
17 Mr. Cardiff's constitutional rights in order to get in there.
18 That was not the role of the receiver; that was not why the
19 receiver was appointed by the Court; and that certainly was not
20 the stated reason or one of the stated reasons that the 03:07
21 Government was seeking a receiver in the first place. This was
22 all kind of a covert operation behind the scenes. That is an
23 unfair advantage.

24 THE COURT: Let me hear from the Government.

25 MR. SEBASTIAN: Sir, Your Honor, I think the Ninth 03:07

1 Circuit in the *Stringer* case is really on point here. As the
2 Government has stated before, August 2017 a CID was issued.
3 The defendant keeps going on about a civil action that occurred
4 in 2018, but there is no need for a civil action to actually
5 have started. It has to be that a civil investigation predated 03:07
6 the criminal investigation and a civil investigation predated,
7 if we go off of this 2018 date, over a year before. So the
8 FTC, because of consumer complaints, is looking at the
9 defendant, sends him a CID, and requests information.

10 This -- under *Stringer*, the fact that the FTC 03:07
11 investigation predates the criminal investigation negates the
12 likelihood of any bad faith. And under *Unruh*, no bad faith
13 exists if the civil investigation culminates in a civil
14 lawsuit. Not only did this culminate in a civil lawsuit, the
15 FTC won a summary judgment on 16 different counts. So this 03:08
16 was -- the receiver is now put into place because of
17 misconduct. And this entire argument that the -- there's an
18 unfair advantage because of secrecy is ridiculous because a
19 grand jury investigation is secret. *Stringer* clearly says that
20 whether an investigation is overt or covert depends on the 03:08
21 Government's discretion. And most investigations are covert
22 because defendants, like this defendant, will destroy documents
23 when the Government is looking into them, just like what
24 occurred here.

25 So these arguments -- the argument that he's not 03:08

1 represented at the start of the civil case: incorrect. Tracy
2 Green represents Cardiff and Redwood for the August 2017 CID.
3 Her web page clearly states that she represents defendants for
4 white-collar defense.

5 This entire argument regarding USPIS being involved,
6 there was six postal agents, two local law enforcement. They
7 came in to assist the receiver in taking over a location. It's
8 two different locations on two separate sides of a parking lot
9 with two different buildings. So two law enforcement is not
10 enough one-on-one to go to a company with 25 employees and the
11 defendant. So they split up law enforcement to go in and
12 ensure access.

13 When we talk about a warrantless search, that's also
14 ridiculous because the receiver in October writes an entire
15 report. When the receiver walks into the location, he finds an
16 entire storage room full of mailing -- mailing papers. These
17 papers indicate that the defendant is sending letters from a
18 master prophet to the elderly. And the receiver then reports
19 that there's \$1.5 million in donations collected. And so for
20 the receiver to see this material and then allow postal to come
21 in and take pictures is not ridiculous. It's something within
22 the receiver's purview because the receiver is put into place
23 because the defendant is committing misconduct. And when he
24 walks into the location, sees the misconduct, he allows postal
25 to then come back at a different time and collect the material

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1 that's relevant.

2 THE COURT: What do you make of the voluminous or
3 repeated communications between the civil CID people and the
4 criminal investigation people --

5 MR. SEBASTIAN: Sure.

03:10

6 THE COURT: -- over a period of time?

7 MR. SEBASTIAN: So there's 710 communications that
8 the Government was not obligated to disclose that we
9 voluntarily turned over. In all of these communications, there
10 is not one instance of misconduct or showing the intertwining
11 under *Scrushy*. The defendant uses *Scrushy* as their main case.
12 In *Scrushy* the SEC not only set the dates and times and
13 locations of depositions, they were also heavily involved.
14 Here the FTC conducted their own, and the Government
15 interviewed over 35 witnesses completely separate from the FTC.
16 The FTC was not at any of the interviews and was not involved.
17 And DOJ was not involved in any of the FTC interviews.
18 Completely separate.

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19 Communications between the two agencies are actually
20 typical. And under *Stringer*, it says that the agencies can go
21 back and forth and communicate. That organization or
22 communication is not something that shows bad faith. Bad faith
23 is an affirmative misrepresentation which involves trickery.
24 And during the defendant's deposition, his attorney clearly
25 asked the FTC attorney whether or not they were talking to

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1 prosecutorial authority. And the FTC attorney states, "From
2 time to time we share information with Government agencies, and
3 those communications with Government agencies may be civil or
4 criminal and are confidential, and we cannot disclose them."

5 THE COURT: All right, then. Very well.

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6 I'll have you get the last word, Ms. Potashner.

7 MS. POTASHNER: Thank you, Your Honor. The one thing
8 that I wanted to point out is that the Government just
9 indicated that the receiver in his due diligence went in after
10 the receivership was -- was approved by the Court and went in
11 and saw materials that caused him concern and brought in the
12 U.S. Postal. That is just not correct. There is an indication
13 now, just to remind the Court --

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14 THE COURT: The U.S. Postal Service people were there
15 before the receiver saw that material.

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16 MS. POTASHNER: That is true. And there's also an
17 indication on September 26th where the FTC is emailing U.S.
18 Postal assessing her availability, the postal agent's
19 availability regarding access and entering Redwood. So it is
20 not correct that the -- that the receiver was surprised by what
21 he saw and then it made sense to bring in U.S. Postal after
22 that. That is just -- that is -- that is a reversal of the
23 order that things happened here. The -- there was a plan by
24 FTC and U.S. Postal to get in and search that property, and the
25 receiver was a vehicle for that search that was used by the

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1 Government, plain and simple based on the evidence and the
2 communications.

3 And I appreciate that the Government, you know, says
4 that the Government didn't have to provide this information to
5 us. I appreciate the Government providing that information,
6 but it doesn't undermine the truth of the matter, which is that
7 the civil case was used as a vehicle to do this criminal
8 investigation.

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9 And I do think it is important that the CID case that
10 the Government is relying on was not a case against
11 Mr. Cardiff. It wasn't. It was a case against Redwood. I
12 understand it's related, but it was not a case against
13 Mr. Cardiff. And Mr. Cardiff was not represented at the front
14 end of the civil case. That's on the docket. The Court can
15 take judicial notice of when a -- when the lawyer came into
16 that case.

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17 THE COURT: Thank you.

18 Thank you, counsel. The matter stands submitted. I
19 expect to issue a ruling by the end of the week.

20 (Proceedings concluded.)

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CERTIFICATE OF OFFICIAL REPORTER

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